

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

C.M., et al.,)	
)	
Plaintiffs,)	CV-19-05217-PHX-SRB
)	
v.)	
)	
United States of America,)	
)	
Defendant.)	
)	
<hr/> A.P.F., et al.,)	
)	
Plaintiffs,)	CV-20-00065-PHX-SRB
)	
v.)	
)	Phoenix, Arizona
United States of America,)	April 26, 2022
)	
Defendant.)	
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BEFORE: THE HONORABLE SUSAN R. BOLTON, SENIOR JUDGE

REPORTER'S TRANSCRIPT OF PROCEEDINGS

DISCOVERY DISPUTE HEARING

(Proceedings conducted via Zoom)

Official Court Reporter:
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Proceedings Reported by Stenographic Court Reporter
Transcript Prepared by Computer-Aided Transcription

A P P E A R A N C E S

(All counsel appearing via Zoom)

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P R O C E E D I N G S

(Whereupon the proceedings started at 12:51 p.m.)

COURTROOM DEPUTY: Civil case 19-5217, C.M. versus the United States of America, and civil case 20-065, A.P.F. versus the United States of America. Both cases set for discovery dispute hearing.

THE COURT: Good afternoon. Maureen has already taken the names of everyone who is appearing on this video conference, and so the minutes will reflect who has appeared and I would only ask that counsel who are going to be presenting just identify themselves by name before they begin speaking for the court reporter.

So this is the time set for a discovery dispute hearing. May I ask at whose request we are having this conference?

MS. REITER: Your Honor, this is Diana Reiter for the C.M. Plaintiffs. Plaintiffs are requesting this conference as to certain issues, and the Defendant is requesting this conference as to other issues.

THE COURT: All right. Why don't you begin, then, Ms. Reiter, and tell me what the issues are that you wish to discuss.

MS. REITER: Certainly. And just before we get to the four issues at issue today, I just want to make the Court aware that the Government is seeking to claw back a

1 previously-produced document on the grounds that it's
2 privileged and that Plaintiffs dispute that claim; and since
3 the Government has marked the document as confidential and
4 consistent with the Rule 502(d) order in this case, we plan to
5 file a joint motion seeking leave to file a Motion for
6 Judicial Determination of a Privileged Claim Under Seal.

7 I don't think there's anything to discuss with
8 respect to that today, Your Honor, unless you have questions,
9 but I just wanted to let you know that was coming.

10 THE COURT: All right, thank you.

11 MS. REITER: The parties have a dispute over the
12 Government's deliberative process privilege assertions.
13 Specifically, Plaintiffs have asked the Government to review
14 certain of their deliberative process privilege assertions in
15 connection with their productions from DHS and its agencies
16 and to conform them to the Court's February 24th order on
17 Plaintiffs' Motion to Compel.

18 The Government has refused to do so and we,
19 therefore, seek an order requiring the Government to undertake
20 that review, which I can outline in more detail now or after
21 I've gone through the other issues.

22 THE COURT: Let's take them one at a time. So
23 discuss the issues with deliberative process first.

24 MS. REITER: Certainly. Your Honor previously ruled
25 on Plaintiffs' Motion to Compel documents improperly reacted

1 based on various privileges; and that motion focused, as you
2 may recall, on two DOJ productions with the idea that the
3 Court's order would provide guidance that would assist the
4 parties in working out privilege disputes with respect to
5 other productions.

6 As I noted, after that order came down, Plaintiffs
7 asked the Government to review its deliberative process
8 privilege claims for some of the remaining productions and to
9 conform those claims to the Court's order.

10 The Government declined to do that, and that's why
11 we're here today; and, Your Honor, the history on this issue
12 demonstrates why the Government should be required to perform
13 this requested review.

14 Notably, every time the Government has been forced
15 to reassess its deliberative process privilege assertions, it
16 has withdrawn a significant percentage of those assertions
17 entirely and has removed other redactions.

18 So, for example, once faced with defending its
19 privilege claims in response to Plaintiffs' first Motion to
20 Compel, the Government withdrew 82 percent of its original
21 deliberative process privilege claims for those two DOJ
22 productions, and then the Court ordered additional
23 reproductions following its in camera review.

24 So effectively, the Government has conceded that its
25 original privilege claims were extremely overbroad and, yet,

1 it's declined to reevaluate its privilege assertions for the
2 vast majority of documents which were not subject to that
3 Motion to Compel, and we have tried to reach a resolution on
4 this issue.

5 When the Government first declined to reevaluate its
6 claims after the February order and in an effort to move the
7 process forward, Plaintiffs asked the Government to review a
8 sample of 57 documents we selected and, again, that review
9 resulted in the Government withdrawing over 33 percent of its
10 privilege claims entirely and then revising redactions for
11 additional documents and revising its privilege log
12 descriptions.

13 So that exercise confirmed, once again, the extreme
14 overbreadth of the Government's deliberative process privilege
15 claims and the need for the Government to do a more
16 comprehensive re-evaluation of its remaining privilege
17 assertions.

18 THE COURT: What is the -- what volume of documents
19 are you requesting that they perform this re-evaluation on?

20 MS. REITER: So, your Honor, the Government,
21 according to their own count, they have asserted privilege
22 claims as to over 8,000 documents.

23 However, we aren't asking them to review all 8,000.
24 Again, in an order -- in order to respond to their claims of
25 burden, we've requested a more narrow review. Specifically,

1 we've asked only that they review documents from DHS and its
2 agencies.

3 We also have limited our request consistent with
4 Your Honor's order. So, for instance, we are only asking the
5 Government to review documents related to development and
6 implementation of the Zero Tolerance Policy and Family
7 Separation. We are not asking them to review draft executive
8 orders and draft reports where the final has been produced
9 because we recognize that in Your Honor's February order Your
10 Honor did not require the Government to produce those
11 documents.

12 So I don't have a precise number for you on the
13 number of documents we're asking them to re-review, but it is
14 likely in the thousands of documents.

15 THE COURT: All right. Let me hear from
16 Mr. MacWilliams.

17 MR. MacWILLIAMS: Good afternoon, Your Honor, Phil
18 MacWilliams on behalf of the Defendant United States.

19 I can start with the number, if that's where the
20 Court wants me to start in terms of responding. According to
21 our calculation, the number of documents over which there's
22 some assertion of the deliberative process privilege, not
23 necessarily a full redaction, but it could be any sort of
24 redaction is about 5,700 documents.

25 Within this set of documents Plaintiffs are

1 referring to, Ms. Reiter referred to a limited set; but the
2 reality is they are asking the Government to re-review all the
3 DHS documents, including ICE and Customs and Border
4 Protection, really just taking out HHS is what they're asking.

5 So if you take the HHS documents out of the
6 equation, we're looking at about 5,700 documents that they're
7 asking us to re-review.

8 THE COURT: So the privilege claims were made before
9 I issued my order in February. Is a re-review not in order in
10 light of that ruling?

11 MR. MacWILLIAMS: If Plaintiffs want to challenge
12 some documents, Your Honor -- this is where -- one of the
13 areas as to where there's sort of fundamental disagreement
14 with Plaintiffs as to what they're asking and what the next
15 step should be.

16 First of all, the Government never refused to
17 re-review anything. Our position is if Plaintiffs have
18 documents that they want to challenge, please bring them to
19 our attention and we will re-review them; and the history that
20 Ms. Reiter provided shows that we are willing to work with
21 them and make changes, make alterations to the privilege log.

22 By no means is it a concession that the privilege
23 assertions were incorrect. Rather, it's, I think, a showing
24 that the Government will work with them and try and move the
25 case forward and avoid a dispute; but what the Government

1 finds wholly unworkable is to say, "Go back and just look at
2 everything again."

3 There could be documents that Plaintiffs would not
4 want to challenge, are not challenging. We think there should
5 be a discrete set of documents that Plaintiffs want to
6 challenge and key those up for discussion first and then we
7 can -- if there's still a dispute, then we can bring it to the
8 Court. To do a re-review --

9 THE COURT: Let me ask, Ms. Reiter, why isn't that a
10 reasonable way to proceed rather than simply asking for,
11 essentially, a wholesale re-review of many thousands of
12 documents?

13 MS. REITER: Your Honor, we think it's unreasonable
14 for several reasons. First, this is a problem of the
15 Government's own making. The record makes clear that they
16 improperly redacted a significant percentage of their
17 documents and that they've known about these issues at least
18 since April 2021, which is when they withdrew the 82 percent
19 of their privilege assertions. So they should have to fix it.
20 The volume is what it is because they have over redacted.

21 Second, the Government's privilege log descriptions
22 are so inadequate that it is impossible for Plaintiffs to
23 identify with any reliability the most relevant documents. We
24 can't use the context from the documents themselves because so
25 many of the documents have been redacted in their entirety

1 except from the "to," "from," "subject line" and "date."

2 And relatedly, the Court observed in its February
3 order that the Government's privilege log descriptions do not
4 always match the document, which further hampers Plaintiffs'
5 ability to identify the most important documents.

6 And finally, the Government bears the burden to show
7 that the deliberative process privilege applies, and it hasn't
8 done that because its privilege logs are so big that they do
9 not provide the information we need to identify the documents.

10 THE COURT: Okay, I've heard enough on that subject.
11 What's your second subject?

12 MS. REITER: Your Honor, Ms. McMillan's going to
13 address the deposition-related issues.

14 MS. McMILLAN: Good afternoon, Your Honor, Lucy
15 McMillan for the C.M. Plaintiffs. We have three different
16 disputes over depositions. The first two relate to
17 Plaintiffs' intention to notice certain Plaintiff-specific
18 depositions, and the third relates to policy level
19 depositions.

20 So as you may recall, the case management order
21 divides the depositions into Plaintiff-specific and policy,
22 and the Plaintiff-specific depositions are related to
23 Plaintiff-specific claims.

24 The policy depositions are defined in the order as
25 "depositions of government officials related to the creation,

1 development and implementation of the family separation
2 policy."

3 So the first dispute concerns two deponents, James
4 De La Cruz and Elizabeth Strange. Plaintiffs intend to depose
5 these Plaintiff-specific deponents, but the Government is
6 objecting and says they are policy deponents.

7 Mr. De La Cruz was a Senior Federal Field Specialist
8 supervisor in the Office of Refugee Resettlement. He was not
9 involved in the creation, development or implementation of the
10 Family Separation Policy and, instead, he was involved in
11 tracking families, assisting with communications issues and
12 reunifications, including for our clients.

13 For example, the C.M. team has e-mails from ORR
14 shelters that concern the reunification of two of our clients
15 that Mr. De La Cruz is on. He also sent spreadsheets relating
16 to issues of communication between parents and children and
17 our clients are on some of those spreadsheets, and there are
18 multiple examples that the parties could share; but in short,
19 he appears to have served as sort of like a troubleshooting
20 role relating to tracking, communication and reunification,
21 including issues raised by the shelters that housed our
22 clients.

23 And Plaintiffs have always said these ideas are --
24 these issues are Plaintiff-specific issues, and so we're
25 asking to depose him as a Plaintiff-specific deponent.

1 THE COURT: So you want to ask him about your two
2 specific Plaintiffs, the reunification that he was personally
3 involved in?

4 MS. McMILLAN: Well, we'd like to ask him about
5 tracking and communication issues. There's many, many
6 spreadsheets that have our clients on them that relate to
7 communication problems and tracking problems and we want to --

8 THE COURT: Well, isn't it likely, then, that he's
9 -- he falls into both categories?

10 MS. McMILLAN: You know, he -- I don't think that he
11 was involved in the creation or implementation of the Family
12 Separation Policy. Those are different categories of people
13 who are involved in developing the policy, pushing it out,
14 making sure it was implemented.

15 He was involved in, if anything, undoing it to some
16 extent; but he was really involved on a granular level as well
17 and, you know, to the extent that he has some knowledge that
18 go beyond our Plaintiffs, I would just point to the
19 Government's own statements in our recent Joint Discovery
20 Plan, which was submitted in February.

21 The Government there said referring to discovery as
22 Plaintiff specific and policy level is a helpful way to
23 conceptualize and organize discovery, but there is some
24 overlap. Depositions of witnesses with Plaintiff-specific
25 information may well cover not only the individual experiences

1 of that plaintiff and child, but also touch on any policies or
2 practices in place at the time. Therefore, Plaintiffs'
3 opportunity to learn such information through depositions is
4 not necessarily limited to the ten policy deponents.

5 THE COURT: So, I guess, is the Government objecting
6 to any deposition of Mr. De La Cruz or just to the scope?

7 MR. MacWILLIAMS: Your Honor, first of all, for what
8 it's worth, this is the Government's issue they want to bring
9 -- that they asked for the hearing on; but to answer your
10 question, it's not the deposition itself. It's how it should
11 be counted against Plaintiffs' totals.

12 They were given twelve policy depositions and then
13 fifteen Plaintiff-specific.

14 THE COURT: And they all have -- has that number,
15 then, all been noticed such that they can't add any more in
16 their -- into one category or another?

17 MR. MacWILLIAMS: No. For both categories, Your
18 Honor, they're not done. They still have more to go.

19 THE COURT: Well, why are we fighting about it
20 before we get to the limit and the Plaintiffs want to take
21 No. 13 or No. 16?

22 MR. MacWILLIAMS: Okay, fair question, Your Honor.
23 That is a possibility if that's how you want to handle it.

24 My -- my views, I think the Plaintiffs agreed, was
25 it would be best to get this disagreement ironed out

1 beforehand so we're not in a situation where Plaintiffs --

2 THE COURT: Well, from my perspective, I think I
3 would be in a much better position to iron out No. 13 or
4 No. 16 if they come up, the possibility exists that they
5 won't, and Mr. De La Cruz having been deposed, it would be a
6 lot easier to know which category he fell into.

7 I don't know enough about him and what the
8 Plaintiffs want to ask him to know whether he should be
9 characterized as one of the twelve policy depositions or one
10 of the fifteen Plaintiff-specific. So why don't you just all
11 go ahead with that deposition, and if a dispute comes up later
12 about exceeding the twelve or the fifteen we can resolve it
13 then.

14 MS. McMILLAN: Your Honor, if I may, the -- the
15 issue is that there are more than twelve relevant policy
16 deponents. I mean, as you know, this spans many, many
17 agencies; and so it's difficult for us to plan which twelve to
18 focus on if we're not sure where some of these are going to
19 fall.

20 THE COURT: I understand your dilemma, but I'm not
21 going to solve it for you.

22 Tell me about why you want to depose the former
23 United States Attorney for the District of Arizona.

24 MS. McMILLAN: Yes, your Honor. So Ms. Strange --
25 we have five -- the C.M. team has five Plaintiff -- adult

1 Plaintiffs. For three of those we have these Border Patrol
2 prosecution memos that list two different ASUAs on them, and
3 two of our clients do not have these prosecution forms at all.

4 So we want to depose one person who can discuss why
5 our clients were not prosecuted, and we would like to depose
6 the person who ultimately had responsibility to decide whether
7 to prosecute our clients.

8 You know, we don't want to depose multiple lower
9 level people, especially because some of the lower level
10 people we have deposed so far in other agencies have said that
11 they were simply following orders or that the records
12 themselves were not correct and they were not, in fact, the
13 person who was -- who did a certain task.

14 So by deposing one person who was ultimately
15 responsible for deciding whether to prosecute our clients, we
16 think that we could get a better understanding of what
17 happened in their cases.

18 THE COURT: What leads you to believe that she has
19 that specific information?

20 MS. McMILLAN: Well, you know, we have -- there is
21 some public reporting that during this time -- I understand
22 that, generally speaking, the acting U.S. Attorney or the U.S.
23 Attorney may not be involved in individual cases.

24 There is some public reporting that at this time she
25 was involved in deciding individual cases. I can't tell you

1 that she was involved in deciding our clients, but she --
2 there is public reporting that she was deciding to decline
3 cases because of the family separation situation; and so, you
4 know, based on that, we do believe she was more involved on a
5 granular level than she may otherwise have been.

6 THE COURT: Well, I guess if you want to use up one
7 of your depositions on this possibility or probability that
8 the former United States Attorney might have specific
9 information, I'm not sure I want to stop you from doing that;
10 but why wouldn't this be better handled using an interrogatory
11 or two?

12 MS. McMILLAN: We have served an interrogatory --
13 let's see, yeah, we could serve an interrogatory to ask who it
14 was she was ultimately responsible. I will note that there
15 are two clients for which there are no forms whatsoever.

16 So you're right, we could serve an interrogatory to
17 ask who was the person responsible for declining their
18 prosecutions.

19 THE COURT: Okay. Mr. MacWilliams, why, if at all,
20 are you opposing the deposition of Ms. Strange?

21 MR. MacWILLIAMS: Your Honor, at this point we're
22 not necessarily opposing the deposition. It's how it should
23 be categorized.

24 Again, the Government's position is that this should
25 be a policy deposition rather than a Plaintiff-specific

1 deposition, and I think what you're seeing here -- whether you
2 want to decide the issue now or not, what you're seeing here
3 is the problem unfolding and the tactic being used, which is
4 Plaintiffs saying we want to ask about -- in Ms. Strange's
5 example, "Why were our clients not prosecuted?"

6 That's going to take about five minutes. For the
7 next six, six and a half hours it's going to be all policy
8 related. They want to use this -- they have an abundance of
9 Plaintiff-specific depositions but, as they've acknowledged,
10 they want more policy depositions.

11 And this is what they're doing, they're using people
12 who should be policy witnesses and are using some kind of a
13 hook to say, "We're going to ask a few questions about our
14 Plaintiffs," and then they're going to veer off into what
15 would clearly be policy-related focus.

16 So I just want to make sure these depositions are
17 categorized the right way and counted the right way against
18 their totals.

19 THE COURT: Okay. So I'm not going to categorize
20 them until after they're taken, and if they're not in the
21 category that the plaintiff wants them to be in, they're being
22 taken at that risk.

23 So what's No. 3?

24 MS. McMILLAN: The third issue is, again, for
25 Plaintiff-specific depositions whether or not -- depositions

1 that are noticed by the C.M. Plaintiffs and during which the
2 A.P.F. Plaintiffs do not depose or ask questions, whether
3 those should be counted against the A.P.F. total of
4 Plaintiff-specific depositions and vice versa.

5 So as Your Honor recalls, the A.P.F. Plaintiffs are
6 entitled to eighteen Plaintiff-specific depositions and the
7 C.M. team is entitled to fifteen. The case management order
8 says that if counsel questions a deponent noticed for a
9 Plaintiff-specific deposition in the C.M. case, that
10 deposition is counted against the total authorized in the
11 A.P.F. case.

12 And so here the C.M. Plaintiffs are planning to
13 notice the depositions of third-party case managers who were
14 responsible for the child plaintiffs in the shelters, and
15 A.P.F. does not believe that any of these individuals were
16 case managers for the A.P.F. Plaintiffs.

17 The A.P.F. Plaintiffs have decided to issue
18 third-party 30(b)(6) deposition notices for the four shelters
19 where their clients were held instead of the seven case
20 managers that were responsible for their child plaintiffs.

21 Neither set of lawyers intends to ask questions at
22 the other's depositions. We've even offered to forego
23 attendance at those depositions, even though that was not
24 contemplated in the case management order and so we're -- we
25 think that A.P.F. third-party 30(b)(6) depositions should not

1 count against C.M. and that the C.M. case workers should not
2 count against A.P.F.

3 THE COURT: And you think differently,
4 Mr. MacWilliams?

5 MR. MacWILLIAMS: I do, Your Honor. As to the case
6 managers, I can't really speak to that because they haven't
7 been noticed or subpoenaed. I don't know who they're even
8 talking about. So whether there's a dispute there as to
9 whether they should be C.M. or A.P.F. or both, I don't know.
10 There's really nothing to bring to the Court yet on those
11 potential depositions.

12 What I can speak to is that the A.P.F. Plaintiffs
13 have subpoenaed four of the ORR grantees. The ORR grantees
14 are where the children were placed while they were in the
15 custody of ORR. To be specific, it's Cayuga Centers, Lutheran
16 Social Services, Southwest Key Programs and Bethany Christian
17 Service.

18 Of those four, the Government's position that three
19 of those should count for -- against C.M. and A.P.F. total
20 because of the overlap of where the children were.

21 Counsel for C.M. read some language from the Court's
22 case management order, but they kind of skipped over the most
23 important part, which I would like to read. "To the extent
24 there is overlap of individuals who were involved with the
25 separations of the parents and children or in the ORR

1 placement of the children in these cases, those depositions
2 will count against the total Plaintiff-specific depositions
3 authorized in each case."

4 So let me go through the numbers. For Cayuga there
5 were three C.M. children, three A.P.F. children. For
6 Lutheran, one of each; and Southwest Key, one of each.
7 There's overlap with these ORR grantees, meaning the children
8 were all at the same places -- or at least in the same care of
9 these grantees.

10 So I think that the Court's order clearly
11 contemplated a situation like this where's there's this sort
12 of overlap, that that should be a joint deposition.

13 THE COURT: Okay. I'm agreeing with Mr. MacWilliams
14 on this, that there was -- when these numbers were set and
15 they were set at different numbers for each case, there was --
16 it was contemplated that there would be overlap, and this
17 seems to be the exact situation that was contemplated.

18 When you have the exact same facility that housed
19 children from both of the cases, why would you not count the
20 30(b)(6) deposition for both?

21 MS. McMILLAN: Well, Your Honor, the C.M. team has
22 decided that it believes deposing the case managers for the
23 children is the strategy we would like to use.

24 We are not planning to attend the 30(b)(6)
25 depositions --

1 THE COURT: What if it is the same -- what if it's
2 the same person? Do you know that the case managers are
3 different?

4 MS. McMILLAN: I don't know that because we don't
5 know who the 30(b)(6) deponent -- I would be surprised if it
6 was the same person because the case managers are very
7 specific granular day-to-day with the children and I think
8 the --

9 THE COURT: Hold on. For your five plaintiffs, are
10 they five different case managers?

11 MS. McMILLAN: They are five different case
12 managers, yes, yes, and we would prefer to take the case
13 manager rather than a 30(b)(6) deposition; but under
14 Mr. MacWilliams' position we don't have that choice because
15 we're running out of depositions if we end up having to take
16 our case managers and attend the 30(b)(6).

17 THE COURT: Have you seen a proposed 30(b)(6)
18 notice?

19 MS. McMILLAN: Yes, and I -- I will defer to --
20 Ms. Park is here, too, for the A.P.F. team, but I would say
21 that it is -- the topics listed are broader than I -- I
22 believe any case manager could answer.

23 THE COURT: And is there any overlap between the
24 case managers in the C.M. case and in the A.P.F. case?

25 MS. McMILLAN: No, the A.P.F. -- well, go ahead

1 Teresa -- I'm sorry, Ms. Park, go ahead.

2 MS. PARK: Your Honor, if I may, Teresa Park for the
3 A.P.F. Plaintiffs. We're happy to answer. To the best of our
4 knowledge, the case managers for our Plaintiffs were seven and
5 they do not overlap, as we understand it, from the C.M. case
6 managers for these facilities and for an additional facility
7 -- or, I'm sorry, or our grantee that Mr. MacWilliams was
8 referring to, and I think -- if I may add a few points.

9 It's certainly no doubt that our cases are complex
10 and that there are a number of witnesses. For A.P.F. alone,
11 for example, we have twelve Plaintiffs and the Government has
12 identified over 130 individuals in its MIDP responses as
13 having relevant knowledge regarding the case.

14 Back in 2020 when A.P.F. and the Government were
15 discussing in its various meet and confers and submitting a
16 joint case management report, which the Court ultimately ruled
17 on, the Court had allowed the A.P.F. Plaintiffs eighteen
18 Plaintiff-specific depositions; but what the Government's
19 position would be, in effect, would mean that A.P.F. may be
20 forced to count the deposition of, let's say, a tangential
21 witness because that witness was a key witness for C.M.'s
22 Plaintiffs or vice versa; and here we believe our 30(b)(6)
23 witnesses, although they haven't yet been identified,
24 (technical glitch) themselves did not overlap as we understand
25 it. In effort --

1 THE COURT: Okay, I've heard enough on this one.
2 I'm going to allow the case managers, the four --
3 I'm sorry, the C.M. case managers' depositions because there's
4 no overlap between these case managers and the case managers
5 in the A.P.F. case. They'll only count against the number of
6 depositions permitted in the C.M. case and not in the A.P.F.
7 case.

8 With respect to the 30(b)(6) depositions, they'll
9 not count against the C.M. Plaintiffs so long as C.M. doesn't
10 appear or participate in the questioning in that case. That's
11 my ruling on that one.

12 Is there another issue?

13 MS. McMILLAN: Yes, your Honor. The third issue is
14 with respect to two individuals who are -- all parties agree
15 are policy deponents, and the issue is whether they can be
16 deposed now or whether they need to be deferred until a later
17 date.

18 So, again, as Your Honor is aware, the case
19 management order states that, "Plaintiffs will conduct
20 depositions of current or former Cabinet level officials,
21 heads of agencies, or White House officials or advisors only
22 on agreement of the parties or with the Court's leave," and
23 that the parties shall meet and confer on or before June 3rd
24 to assess the need for these depositions.

25 The two individuals we would like to depose now are

1 Mr. Albence, who was the Executive Associate Director of
2 Enforcement and Removal Operations at Immigration and Customs
3 Enforcement.

4 THE COURT: Say that again. He was the --

5 MS. McMILLAN: Executive Associate Director of
6 Enforcement and Removal Operations --

7 THE COURT: Okay.

8 MS. McMILLAN: -- at Immigration and Customs
9 Enforcement during the relevant period.

10 So he was not an agency head during the relevant
11 period and he is no longer in the Government. From July 5th,
12 2019, to August 25th, 2020, a year after the events in
13 question, he was the Acting Director of ICE; but as we have
14 represented to the Government, we do not intend to depose him
15 about the time period when he was Acting Director, only about
16 the time period when he was Executive Associate Director of
17 the Enforcement and Removal Operations.

18 And similarly, Mr. Wolf was the Chief of Staff to
19 the Secretary of Homeland Security and not an agency head
20 during the relevant time period, and he's no longer in the
21 Government. He was the Acting Secretary of Homeland Security
22 in 2019 to 2021, although a number of Federal Courts
23 subsequently ruled that the appointment was unlawful.

24 In any event, the Plaintiffs, again, have told the
25 Government we don't intend to depose him about any time when

1 he was the Acting Secretary; and so we are asking to depose
2 these two individuals now and not wait until later because
3 they are critical to the case.

4 They are on documents that are really key to the
5 facts developed here and will inform decisions about future
6 depositions, and the documents show that they were really
7 crucial to the creation, development and implementation of the
8 policy; and then just on a practical level, I'll note if we
9 can't depose people like Mr. Albence and Mr. Wolf now, it's
10 going to be very hard during a June 3rd meet and confer to
11 discuss which higher-level officials we do need because so
12 many people were either heads of agencies, White House
13 officials during the time or are currently heads of agencies,
14 which we will wait until a later date to depose.

15 THE COURT: Okay, let me turn to Mr. MacWilliams.

16 If the Plaintiffs are limiting these depositions to
17 the time periods when they were not acting directors of their
18 agencies but instead had other lesser responsibilities, why
19 shouldn't they go forward now?

20 MR. MacWILLIAMS: Well, Your Honor, that's entirely
21 your decision, of course. All -- the Government's position is
22 the same as with the other depositions. We're just asking
23 that the plain language of the Court order be followed, and
24 the plain language of the Court order says current or former
25 agency heads can't be deposed right now.

1 There's no exceptions for when they were in that
2 role and so on. If the Court wants to grant Plaintiffs' leave
3 to do these depositions now from this particular provision of
4 the order, that's your decision; but the Government's position
5 is if we start -- the Government agrees if we start making
6 exceptions, Plaintiffs are going to keep asking for exceptions
7 of other individuals --

8 THE COURT: Okay --

9 MR. MacWILLIAMS: -- so that's why we can't agree.

10 THE COURT: I think they should go ahead. The
11 intention behind that limitation was to depose people who were
12 holding those positions about these -- the issues in this case
13 while they were holding those positions.

14 With respect to Mr. Albence and Mr. Wolf, they're
15 not going to be deposed as agency heads. They're going to be
16 deposed as to what their -- as to actions they took or
17 policies that were being implemented when they held the
18 positions of Executive Assistant Director of Enforcement and
19 Removal for ICE or Chief of Staff to the DHS Director, not in
20 their roles as Acting Director or -- of either Immigration and
21 Customs Enforcement or DHS, but they do count --

22 MR. MacWILLIAMS: Understood, Your Honor.

23 THE COURT: They do count against the number for
24 policy.

25 MR. MacWILLIAMS: Okay. Thanks, Your Honor. I

1 think we actually agree -- that's one thing the Plaintiffs and
2 I agree on, though.

3 Could I have one point, though, about the Wolf and
4 Albence deposition? They are former officials and they have
5 not been subpoenaed yet. So to the extent -- I wanted to make
6 the record clear to the extent the Court's ruling that they
7 can go forward, it just relates this -- the Court's just not
8 applying this one provision to the case management order.
9 There may be other bases for them to object to a deposition
10 once they're subpoenaed.

11 THE COURT: Right, I --

12 MR. MacWILLIAMS: So I want to make sure that's out
13 there.

14 THE COURT: I understand that the Government does
15 not have control over these individuals and they have to be
16 subpoenaed or accept subpoenas for deposition and, obviously,
17 my ruling today with respect to how this fits into the case
18 management order and the limitations and then is not intended
19 in any way to resolve any other objections that these
20 individuals on their own might make to a subpoena.

21 MR. MacWILLIAMS: Understood, Your Honor.

22 THE COURT: Okay. Is that it?

23 MS. REITER: Your Honor, if I may, I just want to
24 raise two minor issues related to the privilege issue that we
25 discussed earlier.

1 The first is that Plaintiffs would like to request
2 that the Court review in camera 24 documents as to which the
3 Government has maintained its privilege assertions after
4 reviewing the sample that I discussed earlier.

5 Based on the information available, these documents
6 appear to be highly relevant to Plaintiffs' claims, and it
7 also appears that the Government redacted segregable factual
8 information.

9 We are prepared to file a Motion to Compel seeking
10 in camera review of those documents with the Court's
11 permission, unless the Government is willing to provide those
12 documents voluntarily and the Court is willing to conduct such
13 a review. That's the first issue, Your Honor.

14 The second is that the Government's extraordinarily
15 overbroad privilege assertion should not inure to the
16 Government's benefit by preventing Plaintiffs from questioning
17 witnesses about documents that are later produced in response
18 to this dispute.

19 As you just heard, depositions are already under
20 way. So I just wanted to make clear that Plaintiffs reserve
21 their right to move to reopen depositions of Government
22 witnesses to enable Plaintiffs to question them on
23 subsequently-produced documents that are material to
24 Plaintiffs' case.

25 THE COURT: Thank you for reminding me that I didn't

1 give you any guidance on these 5,700 documents for which
2 deliberative process privilege was asserted prior to the entry
3 of my order in February.

4 If these documents are anything like the documents
5 that I reviewed they're not 5,700 discrete documents, but
6 probably numerous copies of the same document with suggestions
7 or red lining -- I think I reviewed -- in the ones that I saw,
8 there were some documents I saw, you know, ten or twelve
9 times.

10 And I think that it is appropriate in light of the
11 Court's order on deliberative process, Mr. MacWilliams, for
12 the Government to take a second look at these documents and
13 see whether or not its privilege log is still consistent with
14 my order, whether it needs to be -- whether some of the
15 documents need to be produced in light of that order and
16 whether or not the privilege log should be amended to be more
17 clear about the basis for the privilege.

18 I am persuaded by the fact that when this was
19 undertaken before my in camera review, it resulted in the
20 Government giving the Plaintiffs a tremendous number of
21 documents that had previously been withheld; and I don't have
22 any reason to believe that that wouldn't be the case if these
23 5,700 documents or whatever smaller number of discrete
24 documents there are were reviewed again, because I think that
25 the order that I entered with respect to deliberative process

1 probably gives clearer guidance than what there was at the
2 time that the privilege log was first made and the documents
3 were withheld or redacted.

4 MR. MacWILLIAMS: Your Honor, just so I make sure
5 we're clear on this. There was an estimate of there being
6 5,700 documents total, and then Ms. Reiter talked about the 57
7 documents they brought to the Government's attention to
8 re-review. I wanted to make sure --

9 THE COURT: No, she said 24, I thought.

10 MR. MacWILLIAMS: Well, there were -- there were --
11 the Plaintiffs said, "Please review these 57 documents," and
12 it made it confusing because on the one hand there's 5,700
13 documents in the larger set and Plaintiffs said, "Please
14 review these 57," and the Government did that already; and
15 based on that re-review, the Plaintiffs are now challenging
16 24.

17 THE COURT: Oh, okay.

18 MR. MacWILLIAMS: I think that's what Ms. Reiter was
19 talking about. She wants to file a Motion to Compel with
20 respect to those 24 documents that -- for which the redaction
21 still survived following the Government's re-review, and
22 that's what she wants to bring to the Court's attention for an
23 in camera review.

24 MS. REITER: If I may, that's not accurate. We do
25 want to bring the 24 documents to Your Honor's attention for

1 in camera review; but Your Honor's absolutely correct, our
2 primary request is a re-review of the 5,700 documents that you
3 just discussed.

4 THE COURT: I think -- and that's what I'm saying I
5 believe is appropriate, Mr. MacWilliams, in light of the
6 Government's change before my in camera review that resulted
7 in a substantially more production than had originally been
8 made with respect to the DOJ documents that I don't have any
9 reason to believe that wouldn't be the same result when the
10 DHS documents were reviewed again.

11 There was a significant amount of over redaction and
12 claim of deliberative process when it was -- well, it was just
13 done overly broadly based on what I reviewed of the many
14 documents that were the subject of my two prior orders, and
15 we're talking deliberative process here, not attorney-client
16 privilege. So that's my ruling.

17 MR. MacWILLIAMS: That's correct.

18 THE COURT: Okay, that's my ruling and that's all
19 the time we have today. Thank you very much.

20 MS. REITER: Your Honor, if I could just ask a
21 clarifying question? With respect to the 24 documents that
22 the Government has already reviewed and that we still dispute
23 the privilege claim for, should we go ahead and file a Motion
24 to Compel in camera review of those documents?

25 THE COURT: You may.

1 MS. REITER: Thank you, your Honor.

2 THE COURT: Okay, thank you very much.

3 Court is in recess.

4 MS. REITER: Thank you.

5 MS. McMILLAN: Thank you, your Honor.

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7 *(Proceedings ended at 1:33 p.m.)*

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REPORTER'S CERTIFICATION

I, TERI VERES, do hereby certify that I am duly appointed and qualified to act as Official Court Reporter for the United States District Court for the District of Arizona.

I FURTHER CERTIFY that the foregoing pages constitute a full, true, and accurate transcript of all of that portion of the proceedings contained herein, had in the above-entitled cause on the date specified therein, and that said transcript was prepared under my direction and control.

DATED at Phoenix, Arizona, this 27th of April, 2022.

s/Teri Veres
TERI VERES, RMR, CRR